Supreme Court, U.S.
FILED
APR 23 2001
OFFICE OF THE CLERK

(2)

No. 00-1479

In the
Supreme Court of the United States

MARK ROBERTSON,
Petitioner

VS.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **WHETHER ROBERTSON WAS ENTITLED TO A JURY INSTRUCTION ON A LESSER INCLUDED OFFENSE OF MURDER WHERE THERE WAS NO EVIDENCE TO SUPPORT THE INSTRUCTION.**

2. **WHETHER ROBERTSON PRESENTED CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE, AND, IF SO, WHETHER THAT EVIDENCE WAS WITHIN THE JURY'S EFFECTIVE REACH UNDER THE INSTRUCTIONS SUBMITTED AT THE PUNISHMENT PHASE OF TRIAL.**

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), respondent[1] herein, by and through the Attorney General of Texas, and files this brief in opposition.

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[1] The petitioner is referred to as "Robertson" and the respondent is referred to as "the Director."

OPINION BELOW

A copy of the published opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability ("COA"), *Robertson v. Johnson,* 234 F.3d 890 (5th Cir. 2000), is attached to Robertson's petition for writ of certiorari as Appendix A.

JURISDICTION

Robertson seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Robertson bases his complaints on the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Robertson is confined pursuant to a judgment and sentence of the Criminal District Court No. 5 of Dallas County, Texas, Cause No. F89-85961-NL, styled *The State of Texas vs. Mark Robertson.* Robertson was indicted on September 18, 1989, for the capital offense of the intentional murder of Edna Brau while in the course of committing and attempting to commit the offense of robbery of Brau on or about August 19, 1989. Tr 3.[2] The case against Robertson was heard by a jury, which found him guilty of capital murder on January 29, 1991. Tr 311. Following a separate punishment hearing, the jury answered affirmatively special issues number one and two, submitted pursuant to former TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1988).[3] Tr 317-18. In accordance with Texas law, the trial court

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[2] "Tr" refers to the direct appeal transcript, and "SR" refers to the direct appeal record.

[3] At the time of Robertson's trial, the sentence in a Texas capital murder case was based upon the jury's answers to the following special issues:

sentenced Robertson to death. Tr 321-23. Robertson directly appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on December 8, 1993. *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993). The Court of Criminal Appeals denied Robertson's motion for rehearing on March 9, 1994. Robertson next filed a petition for a writ of certiorari, which was denied by this Court on October 3, 1994. *Robertson v. Texas*, 513 U.S. 853 (1994).[4]

Robertson filed an application for writ of habeas corpus in state court on April 14, 1997, again raising the *Beck* and *Penry* claims. An evidentiary hearing was held on November 21, 1997. The trial court entered findings of fact and conclusions of law recommending that relief be denied on June 26, 1998. The Court of Criminal Appeals adopted the trial court's findings of fact and conclusions of law, and found that neither the facts nor the law supported Robertson's allegations. Accordingly, the court denied relief on November 18, 1998.

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(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Because there was no evidence of provocation in the instant case, only the first two issues were presented to the jury. The jury was also given a supplemental instruction, directing the jury in part as follows: "In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are 'Yes,' and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues 'No' in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you."

[4] Robertson raised, as he had on direct appeal, the *Beck v. Alabama*, 447 U.S. 625(1980), and *Penry v. Lynaugh*, 492 U.S. 302 (1989) claims raised here.

Ex parte Robertson, No. 30,077-01 (Tex. Crim. App. November 18, 1998).

Robertson's application for a federal writ of habeas corpus was filed on November 23, 1998, in the United States District Court for the Northern District of Texas. Robertson alleged, again, constitutional error arising from: (1) the trial court's refusal to give the jury an instruction on the lesser included offense of murder, and (2) the trial court's submission of a supplemental instruction and refusal to create a third special issue on the effect of mitigating evidence. The district court entered final judgment denying relief on April 28, 2000. Robertson timely filed notice of appeal and applied for COA on May 5, 2000. The district court denied COA on May 15, 2000. On June 26, 2000, Robertson filed a motion for COA in the Fifth Circuit. On December 4, 2000, the Fifth Circuit denied COA. Robertson then filed a petition for rehearing which was denied on January 3, 2001. Robertson's instant petition followed.

B. Statement of Facts

1. Guilt-innocence Phase

The background of the case was accurately set out by the Fifth Circuit in opinion denying COA:

> Edna Brau and her grandson, 19-year-old Sean Hill, were last seen alive on August 19, 1989, at Brau's Dallas, Texas home where both Brau and Hill lived. Hill's accommodations were in a separate wing of the house, with its own bath and an outside door providing independent access to the home. On the afternoon of August 20, 1989, Brau's daughter and son-in-law came to Brau's home and found her dead on the den sofa. Police later determined that Brau was shot once in the face. Hill was found dead in a pond behind the house. Hill was shot once in the back of the head. Brau's belongings in her portion of the residence, including the den, master bedroom, master bedroom dressing area, kitchen, and dining room were in disarray, as

though someone had rummaged through the house. Brau's purse, her car keys, the papers on her car, and her blue Cadillac were all missing, together with other personal belongings.

* * *

Eight days later, a Las Vegas police officer observed Robertson, accompanied by a male passenger, driving the stolen Cadillac on the Las Vegas strip. A NCIC computer check confirmed that the car was stolen and that the occupants might be armed and dangerous. Las Vegas police continued observing the car after it was parked in the parking lot of the Circus Circus casino. When Robertson and the passenger returned to the car, the police moved in to apprehend both men. The gun used to murder Brau and Hill was found in Brau's Cadillac.

At the arrest scene, Robertson informed police that they were lucky to have approached quickly, before he could retrieve the gun hidden under the seat. Robertson asked police where the television cameras were and whether he was on America's Most Wanted. When Las Vegas Sergeant Mark Medina inquired what he meant, Robertson confessed to Medina that he was on probation for robbery in Dallas and, further, that he had shot Edna Brau and her grandson Sean Hill in Dallas. Robertson told Sergeant Medina that he went to the house to see Hill, who had been a friend and drug supplier of Robertson's. Robertson claimed that he and Hill used some crank (crystal methamphetamine), and then went outside to go fishing.[5] Robertson told Sergeant Medina that while Hill was fishing, he shot Hill once in the back of the head with a .38 caliber firearm. Robertson told Medina that he wanted to

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[5] Contrary to Robertson's oral confession, the autopsy performed on Hill indicated that there were no drugs in Hill's body at the time of his death.

steal Hill's drugs. Robertson also told Medina that he went into Brau's portion of the home because he wanted to find money, jewelry, and the title to Brau's car, which he planned to sell later. Robertson shot Brau once in the head when he discovered her watching television on the couch in her den.[6]

Robertson also signed a written confession, in which he states:

> On Saturday night around 9 PM I decided to walk over to Sean's house on Hathaway where he lived with his grandmother. When I got there, Sean was in his room watching T.V. We sat around watched TV and did some pot and crank. We then decided to go fishing out in the backyard. We were using one stick with a string and a hook. We would trade off, I think we caught some seven catfishes. While we were fishing, I think we were kneeling. I pulled my gun out of my pants and shot Sean once in the head. After I shot him, Sean fell in the water. I then ran in the house through Sean's bedroom and into the bathroom where I splashed some water over my face. I then walked into the den where Mrs. Hill, Sean's grandmother, was watching TV and I shot her once. I unplugged the TV because it was playing and so was the radio in the bedroom. I looked through her bedroom drawers and found her purse on the make-up counter. I saw some costume jewelry but left it alone. I

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[6] Robertson later made consistent oral confessions to other officers.

did take a wristwatch which I later threw away in a garbage can but I don't remember where. I then ran into Sean's room and took his crank which was left on the bed. I then drove off in Mrs. Hill's car. I went on home and then went to Showtime on Greenville and Lover's where I wiped it all down and left it there. I then walked back home. Next day while listening to the evening news I heard about their bodies being found. I couldn't sleep for the next couple of days so I figured that I would just leave. I walked back to the parking lot at Showtime where I got in the car and decided to drive to Las Vegas where my parents used to bring me. I had left the car in the parking lot. I threw the purse away in a dumpster at the Village Apts. I think that I left on Tuesday sometime around 4 PM. I drove all the way to Albuquerque, N. Mexico where I spent the night and the following day I drove to Vegas. I was staying at the SuLinda Motel in Vegas. I met Nikki two or three days later at the Circus-Circus. I used my roommate's money to get to Vegas. He had some $700.00 in cash in his room. I think that Mrs. Hill's purse had some $37.00 in cash which I took. These past few days I didn't know what to do and when I got arrested I felt relieved for the most part because I didn't have to run anymore.

234 F.3d at 892-93.

2. *Punishment Phase*

The punishment case was also accurately summarized by the Fifth Circuit in its opinion denying COA:

> During the punishment phase, the state presented evidence, inter alia, relating to Robertson's past criminal behavior, which included serious vandalism at about age 12, suspension for taking a loaded handgun to school at about age 13, car theft and destruction of property at about age 14, marijuana possession at about age 15, and a second marijuana possession resulting in conviction at about age 18, an aggravated robbery conviction involving a baseball bat and knife at about age 18, and thirteen cases of issuing bad checks at about age 19, after which he violated the terms of his probation on the aggravated robbery charge and the bad check charge by failing to report, failing to pursue drug counseling, and failing to perform community service. The state also presented extensive evidence relating to Robertson's murder of the 19-year-old convenience store clerk only ten days before he killed Brau and Hill. Finally, the state produced records of Robertson's bad prison behavior since incarceration on the charge, including evidence of an escape attempt and a fire he set in his cell.
>
> Robertson produced evidence that his father was alcoholic and both physically and emotionally abusive, that he was considered respectful and polite by some, that he had obtained a GED before quitting school, and that his girlfriend considered him a good person. Robertson also presented evidence of his struggle with drugs.

Id. at 894.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. As an initial matter, Robertson filed his federal habeas petition on March 6, 1998, well after enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). *(Michael) Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Under the amended provisions of Section 2254(d), a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of law and fact. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). This Court's decision in *(Terry) Williams* makes clear that a federal court's discretion to grant a writ of habeas corpus is limited and the court may only issue a writ if the state court's decision was "contrary to" or "involved an unreasonable application of" established federal law. 529 U.S. at 412-13.

Under the "unreasonable application" clause, the court may grant the writ if the state court identifies the correct governing legal

principle but applies it incorrectly, or extends or refuses to extend a legal principle to an area outside the scope intended by this Court. *Id.* at 408, 413. Furthermore, the state court's application of the law must be "unreasonable" in addition to being merely "incorrect." *Id.* at 411. This Court explained, "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

Under the "contrary to" clause of section 2254(d)(1), a federal court may grant the writ if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Id.* at 412-13. Here, for the reasons discussed below, and in light of the AEDPA standard of review, Robertson fails to advance a compelling reason for this Court to review his case, and none exists. Accordingly, this Court should decline to exercise its certiorari jurisdiction to review Robertson's claims.

II.

THE FIFTH CIRCUIT PROPERLY HELD THAT THE STATE COURT REASONABLY APPLIED *BECK V. ALABAMA* IN UPHOLDING THE DENIAL OF A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF MURDER.

Robertson claims he was entitled to a lesser included instruction on murder under *Keeble v. United States*, 412 U.S. 205 (1973), and *Beck v. Alabama*, 447 U.S. 625 (1980), because the evidence at trial raised competing inferences as to whether he formed the intent to rob Brau before or after he murdered her. However, this claim does not warrant certiorari review because the lower court, as well as the state court, reasonably found that no constitutional violation occurred because there was no evidentiary basis for instructing the jury on a lesser included offense.

In *Beck* this Court held that the death penalty could not be imposed "after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of a lesser included non-capital

offense, and when the evidence would have supported such a verdict." 447 U.S. at 627. *Accord Hopper v. Evans*, 456 U.S. 605, 609 (1982). This principle was not violated by failing to give a lesser-included instruction in Robertson's case.

In *Beck*, this Court invalidated, on the basis of the Eighth and Fourteenth Amendments, Alabama's blanket statutory prohibition against giving lesser-included offense instructions in capital cases. Alabama's death penalty scheme provided juries in capital cases with only two options: find the defendant at once guilty of capital murder and sentence him to death or acquit him.[7] *Id.* at 645. The *Beck* Court's holding stemmed from its recognition that the all-or-nothing choice between death and total acquittal could lead juries to act unlawfully: convicting of capital murder and imposing the death penalty because the defendant was guilty of a serious, violent crime, although there was reasonable doubt as to this guilt of the capital offense; or acquitting, although the defendant was plainly guilty of the capital crime, because of a belief that he did not deserve to die. *Id.* at 642-43; *Hopper v. Evans*, 456 U.S. at 609. The *Beck* Court, thus, "was concerned with insuring that *sentencing discretion* in capital cases is channeled so that arbitrary and capricious results are avoided," and the Court's holding was limited to the facts of that case. *Hopper*, 456 U.S. at 611 (emphasis added).

Robertson fails to take into account the critical differences that exist between the relevant Texas and Alabama death penalty statutes. The Alabama sentencing scheme under consideration in *Beck* was a unitary one in which, if the jury found the defendant guilty of the capital crime, it was *required* to impose the death penalty. *Id.* at 609. The Texas statute, by contrast, provides for a bifurcated procedure in a capital case, pursuant to which the jury first must find the defendant

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[7] Under the Alabama sentencing scheme at issue in *Beck*, the jury had the ultimate sentencing power, and after a jury found a defendant guilty and fixed punishment at death as required by law, it was incumbent upon the trial judge to conduct a hearing on punishment. However, the *Beck* Court found that the state's statistics showed that the jury's verdict would ordinarily be followed by the trial judge even though he must hold a separate hearing on punishment and, thus, was "not persuaded that sentencing by the judge compensate[d] for the risk that the jury would return an improper verdict because of the unavailability of a "third option."

guilty of the capital offense. The mere factual finding of guilt does not result in a death sentence. Only after this finding of factual guilt, and after a separate evidentiary proceeding, does the jury consider whether the defendant should be sentenced to death or life imprisonment. TEX. CODE CRIM. PROC. ANN. art. 37.071. Thus, unlike the situation presented in *Beck*, the failure to give a lesser-included offense instruction does not result in the capital jury's being forced to choose between setting the defendant free or convicting him of the capital crime and sentencing him to death. *Beck* does not require that the jury be given the option of convicting a capital defendant of a lesser-included offense when the capital sentencing scheme does not pose the potential for unreliable sentencing inherent in the Alabama scheme. *See Hopkins v. Reeves*, 524 U.S. 88 (1998). The central concern of *Beck* consequently is not implicated in this case, because Robertson's jury was not presented with an all-or-nothing decision. *See Schad v. Arizona*, 501 U.S. 624 (1991).

Although *Beck* itself spoke only to a statute under which the judge could not give the requested instruction, the rationale of *Beck* has nonetheless been held by lower federal courts to apply equally to cases in which a trial judge refuses to give an instruction that is available under state law. *Lincecum v. Collins*, 958 F.2d 1271, 1275 (5th Cir.), *cert. denied*, 506 U.S. 957 (1992), *citing Cordova v. Lynaugh*, 838 F.2d 764, 767 & n. 2 (5th Cir.), *cert. denied*, 486 U.S. 1061 (1988); *Reddix v. Thigpen*, 805 F.2d 506, 511-12 (5th Cir. 1986). To be entitled to an instruction on a lesser-included offense, a capital defendant must demonstrate that a "rational juror, given all the facts, [could acquit him] of capital murder and [convict] him of [the] lesser included offense." *Andrews v. Collins*, 21 F.3d 612, 629 (5th Cir. 1994)(citing *Cordova v. Lynaugh*, 838 F.2d at 767), *cert. denied*, 513 U.S. 114 (1995). "This necessarily requires a showing that the facts of the case and the laws of the State warrant such an instruction." *Hill v. Black*, 920 F.2d 249, 252 (5th Cir. 1990), *modified*, 932 F.2d 369 (5th Cir. 1991). Under Texas law, a lesser-included offense instruction must be given if there is "some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense." *Godsey v. State*, 719 S.W.2d 578, 584 (Tex.Crim.App. 1986).

Where, as here, a state court examines the evidence and determines that the jury could not rationally convict the defendant of the lesser-included offense, the state court's conclusion forecloses relief. *Hill v. Black*, 920 F.2d at 251.

In Robertson's case, the aggravating element of robbery distinguished his capital offense from simple murder. *See* TEX. PENAL CODE § 19.03(a)(2). Robertson asserts that the jury could have concluded that he killed Brau because he was sociopathic, high on drugs, or wanted to eliminate Brau as a potential witness to the murder of Hill, and that he thereafter decided to steal Brau's property. But the evidence does not support an instruction on the lesser included offense of murder.

Robertson confessed that he had a serious drug problem, that he had previously purchased drugs from Hill, and that after he killed Hill, he went back to the house to steal Hill's drugs. 58 SR 156; 59 SR 23, 26, 56. He also stated that after shooting Brau, he began looking for Hill's drugs, any money or jewelry, and the title to Brau's car. 58 SR 156; 59 SR 28. In addition to taking the drugs from Hill's bed after killing Brau, Robertson took $30 in cash, Brau's wristwatch and purse, the title to Brau's Cadillac, and the Cadillac itself. 59 SR 29, 56. This evidence was not rebutted, as Robertson chose not to present any evidence on his own behalf during the guilt-innocence phase of the trial. *See* 59 SR 116. As owner of the house, Brau was also the owner, as defined in the charge, of any property in the house, as she clearly had a right superior to Robertson to any such property.[8] Therefore, Robertson's stated intent to steal drugs belonging to Hill prior to killing Brau satisfies the "in the course of committing a robbery" element of

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[8] The court's charge at the guilt-innocence phase of Robertson's trial defined "owner"as follows: "Owner means a person who has title to the property, possession of the property, *or a greater right to possession* of the property than the actor." Tr 305 (emphasis supplied). *See* TEX. PENAL CODE § 1.07(a)(35)(A). Under Texas law, proof of ownership may be made by circumstantial evidence, and strong circumstantial evidence of ownership (the relationship between Brau and Hill, and the fact that it was Brau's house) existed in this case. *See Robertson*, 871 S.W.2d at 707.

Robertson's capital murder charge.[9]

Moreover, there is no evidence that the taking of Brau's money, jewelry, and car was an afterthought. On the contrary, Robertson's express purpose for re-entering the house was to steal. 59 SR 26. Robertson entered Hill's room through his separate outside entrance and splashed water on his face. 59 SR 55-57. However, before taking the drugs that were lying on Hill's bed and leaving, he entered the separate portion of the house in which Brau lived and killed her, and then began ransacking the house in search of money, jewelry, and the title and keys to Brau's Cadillac. Given the foregoing, a jury could not have rationally acquitted Robertson of capital murder and found him guilty of the lesser offense of murder. Robertson presents no evidence that he may have killed Brau because he was a sociopath, was high on drugs, or because he did not want her to be a potential witness to Hill's murder. Accordingly, there was no error in failing to instruct the jury on the offense of murder in Robertson's case. *See Hopper v. Evans*, 456 U.S. 605.

On state habeas review, the trial court made detailed findings and concluded that the evidence did not support the instruction on murder. The state court found that there was ample record evidence to establish that Robertson formed the intent to rob Mrs. Brau before he killed her, and that there was absolutely no record evidence to support Robertson's speculative contention that he could have formed the intent to rob Mrs. Brau after he shot her. Upon reviewing the record, the Fifth Circuit found that there was no basis for finding that the state habeas court's factual determinations were either unreasonable or were rebutted by clear and convincing evidence to the contrary.[10] Because the denial

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[9] Under Texas law, the intent to rob must be formed before the murder, but there is no requirement that the wrongful appropriation take place before the murder. *See Robertson*, 871 S.W.2d at 705.

[10] Robertson additionally asserts that the Fifth Circuit erred to the extent that it required him to cite Supreme Court authority to demonstrate that the state habeas court's application of *Beck* was unreasonable, and maintains that the application of *Beck* was unreasonable under *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir.), *cert. denied*, 486 U.S. 1061 (1988). The Fifth Circuit, in noting that Robertson did not identify any Supreme Court authority capable of calling the state habeas court's reliance upon *Beck* unreasonable, was referencing the applicable standard of review, which requires Robertson to show that the state court decision either (1) resulted in a decision

of relief by the state courts was reasonable and not contrary to clearly established Supreme Court precedent under the AEDPA, federal habeas relief was appropriately denied.

III.

THE FIFTH CIRCUIT PROPERLY HELD THAT THE STATE COURT REASONABLY APPLIED *PENRY* IN UPHOLDING THE PUNISHMENT PHASE INSTRUCTIONS.

Robertson argues that a supplemental instruction submitted at the punishment phase of his trial was an unconstitutional "nullification" instruction under *Sparf v. United States*, 156 U.S. 51 (1895) and *Roberts v. Louisiana*, 428 U.S. 325 (1976). He complains therefore that the charge failed to provide a vehicle for consideration of evidence "that he had been terrorized during his early childhood by an abusive, alcoholic father, had a significant drug problem, and was generally polite and respectful." However, the evidence Robertson points to was not constitutionally relevant mitigating evidence, and even if it were, was not beyond the scope of the two special issues given. Therefore any infirmity in the supplemental instruction has no Eighth Amendment implications. In any event, even if the evidence were constitutionally relevant *and* beyond the scope of the two special issues, the supplemental instruction – itself not an unconstitutional "nullification"

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that was contrary to, or involved an unreasonable application of, clearly established federal law, *as determined by the Supreme Court of the United States*; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). The Fifth Circuit did not *require* Robertson to cite Supreme Court authority to demonstrate that the state habeas court's application of *Beck* was unreasonable. Rather, the Fifth Circuit put Robertson to his task of showing that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Robertson*, 234 F.3d at 898. Whether or not Robertson was entitled to a lesser included instruction on murder is a fact based question, determinable from the record, and the facts in this case do not compare to those in *Cordova*. In that case, in the face of evidence that *Cordova did not personally participate in the robbery of Hernandez and no stolen property was traced to Cordova*, the Fifth Circuit found that a rational jury could have concluded that Cordova had no "prior agreement or common purpose" to rob Hernandez, and could then have acquitted Cordova of capital murder, and found him guilty of murder. *Cordova*, 838 F.2d at 768-69.

instruction – provided the jury with an adequate vehicle to consider the evidence.

A. The evidence was not constitutionally relevant mitigating evidence.

A capital defendant is entitled to an individualized sentencing decision that is a reasoned moral response to the evidence, including mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). The precise rule that *Penry* established is that when mitigating evidence is presented that the jury cannot fully consider and give effect to when answering the special issues, "Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed . . ." *Id.* at 318-19. This was done in Robertson's case.

As this Court recognized in *Skipper v. South Carolina*, however, not everything that a defendant introduces in mitigation of punishment is "relevant mitigating evidence." *Skipper*, 476 U.S. 1, 7 n.2 (1986). Evidence of a defendant's character or background attains constitutionally mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character or background proffered in mitigation of punishment:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (emphasis in original)); *see also Penry*, 492 U.S. at 319. Unless the

defendant can demonstrate some connection between his crime and his proffered evidence, he does not show that his culpability is reduced. *See Madden v. Collins*, 18 F.3d 304, 307 (5th Cir. 1994), *cert. denied*, 513 U.S. 1156 (1995) (finding that in contrast to Madden's case, in Penry "there was a clear nexus between Penry's handicap and his criminal act"). Without a nexus between the crime and the defendant's proffered mitigating evidence, such evidence can only provide a basis for the jury to exercise sympathy for the defendant, and a decision based only on sympathy cannot be a reasoned moral response to the defendant's culpability. *See Saffle v. Parks*, 494 U.S. 484, 492-93 (1990). Robertson's evidence of childhood abuse, without more, is not relevant to his culpability for his crime. Moreover, as Robertson also fails to demonstrate a nexus between the abuse and the crime, the evidence would also not have any bearing on his potential, or lack thereof, to commit acts of criminal violence in the future. The evidence of childhood abuse thus only provides a basis for the jury to exercise sympathy or mercy, to which Robertson is not constitutionally entitled. *Id.* at 492-93.

Similarly, Robertson does not demonstrate a nexus between his drug use and the murder of Brau that would reduce his culpability. His confessions demonstrate not that he killed Brau because he was high and irrational, or even that he was acting under the duress of an uncontrollable addiction; rather, the evidence shows that he merely shot Brau in order to facilitate the robbery.[11] This evidence is, therefore, irrelevant to the sentencing concerns recognized by the Supreme Court. *See Franklin v. Lynaugh*, 487 U.S. 164, 184; *see also Skipper v. South Carolina, supra*; *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (heart of retribution rationale is that sentence be directly related to the culpability of defendant).

Nevertheless, even if the evidence "that [Robertson] had been terrorized during his early childhood by an abusive, alcoholic father,

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[11] Several witnesses (including some of Robertson's) testified that although Robertson used drugs, they did not know him to be an addict, and that, in any event, Robertson did not have trouble controlling his behavior. *See* 62 SR 137, 154; 63 SR 87, 114, 135, 150. However, Robertson himself attributed his actions to his drug problem. *See* 59 SR 23, 26 (relating to the Brau and Hill murders); 63 SR 52 (relating to the 7-11 murder).

had a significant drug problem, and was generally polite and respectful" had some constitutionally relevant mitigating aspect, that aspect could be given effect under the two special issues submitted.

B. The evidence could be considered under the two special issues.

Robertson cannot demonstrate a "reasonable likelihood" that the jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (citing *Boyde v. California*, 494 U.S. 370, 380).

The requirements of the Eighth Amendment are satisfied if the mitigating value of constitutionally relevant evidence, as actually proffered at trial, is within "the effective reach" of the jury in responding to the statutory punishment issues and instructions. *Johnson v. Texas*, 509 U.S. 350, 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). Mitigating evidence is beyond the effective reach of the sentencer only if there exists a reasonable likelihood that the jurors would have considered themselves foreclosed from considering the mitigating evidence in answering the special punishment issues submitted to the jury. *Johnson v. Texas*, 509 U.S. 350, 368-369. Further, "[i]n evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 509 U.S. 350, 368 (quoting *Boyde v. California*, 494 U.S. 370, 381).

As previously noted, Robertson's jury was asked to answer two special issues at the punishment phase of trial. The first special issue asked, "Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Mark Robertson, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" The second special issue asked, "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Mark Robertson, would commit criminal acts of violence that would

constitute a continuing threat to society?" The evidence this Court decided could not be given effect through similar special issues given in Penry's case, that is, the evidence that Penry had organic brain damage, a 54 IQ, and no ability to learn from his mistakes, was simply not present in the instant case.[12]

In contrast, to Penry, Robertson was regarded as highly intelligent and was characterized, as, at least when he was off drugs, able to conform his conduct to the law. 63 SR 14, 46, 49, 78, 87, 104, 147. Further, Robertson's drug problem, unlike permanent brain damage, was treatable. Obviously, all of this evidence, as well as that of Robertson's childhood abuse and polite and respectful nature, could be considered under the two special issues given. The evidence of Robertson's good conduct around adults, for instance, is relevant to appropriate sentencing concerns to the extent it demonstrates that the "criminal conduct was an aberration from otherwise good character." *Boyde v. California*, 494 U.S. 370, 382 n.5 (1990). And this is precisely what defense counsel argued. *See* 65 SR 81-82 ("There are two Mark Robertsons that you have heard about. You have heard about the young man who is a loving son, neighbor, sibling." "Then all of a sudden, for ten days in August of 1989, you have a young man who does horrible things. These are horrible things. It's the same person. You know it is.").

Defense counsel essentially argued that the abuse Robertson suffered as a child, never resolved, caused the drug use, and that the drug use was in turn the catalyst for Robertson's deadly crime spree in August of 1989. 65 SR 87-89. Characterizing the events of August

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[12] In fact, it can be inferred from the record that no such evidence existed. Towards the end of its case on punishment, defense counsel made a motion for continuance so that testing could be done to discover whether Robertson, like Penry, had organic brain damage. At the hearing on the motion, Dr. J. Douglas Crowder, who had examined Robertson on his drug use and the effect of that use, expressed his medical opinion that further tests (an MRI, quantitative EEG and neuropsychological testing, which could be done by a Dr. Fulbright the next day) were necessary to confirm or deny indications he (Crowder) had that there was a possibility that Robertson had organic brain damage. The trial court granted the continuance so that the testing could be completed. 65 SR 55. When the trial was resumed, the defense, rather than presenting evidence from either Crowder or Fulbright, immediately rested its case. 65 SR 56.

1989 as "irrational drug-induced actions," defense counsel argued that there was not deliberation involved. 65 SR at 92. This evidence could logically be considered under the first special issue. Aware that the jury had been inundated throughout the trial with extensive testimony suggesting that Robertson was willing to go into drug treatment, but needed the structure of a lock down facility, defense counsel argued that in the controlled environment of prison, Robertson had not been and would not be a future danger.[13] 65 SR 92-93. This evidence was naturally relevant to the second special issue. *See Franklin v. Lynaugh*, 487 U.S. 164, 177-80 (evidence of good disciplinary record while incarcerated is character evidence relevant to capital defendant's likely future behavior). Again, the evidence in *Penry* suggested that Penry's mental retardation rendered him unable to learn from his mistakes. As a consequence, this Court decided the mitigating evidence was relevant to the second special issue "only as an aggravating factor because it suggests a 'yes' answer to the question of future dangerousness." *See Johnson v. Texas*, 509 U.S. 350, 365, 369. In this case, as discussed *supra*, the evidence Robertson points to was not relevant to the future dangerousness special issue *only* as an aggravating factor. The jury, had it been so inclined, could have concluded (as it was invited to) that Robertson's crimes were fueled by methamphetamine addiction; that Robertson's crimes were not reflective of his polite and respectful nature (as attested to by Robertson's multiple witnesses at punishment); and that Robertson, in the controlled environment of prison, would simply not be a future danger.

For these reasons, even if Robertson's jury had not been specifically instructed to consider mitigating evidence in answering the special issues, as was the case in *Penry*, this claim would not warrant certiorari review by this Court. Nonetheless, assuming arguendo that any mitigating aspect of this evidence was beyond the scope of the two special issues, the supplemental instruction provided the jury with an adequate vehicle to consider it.

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[13] Robertson spent considerable time in several different drug rehabilitation programs, but eventually dropped out or walked away from most of them. *See* 61 SR 111, 122; 63 SR 56-58, 65, 140.

C. *The supplemental instruction provided an adequate vehicle for the consideration of mitigating evidence.*

As previously noted, Robertson's jury was asked to answer two special issues at the punishment phase of trial. The court's general instructions preceding the special issues provided, in relevant part:

> You are instructed that you shall consider any evidence, which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to an aspect of the defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence, which in your judgment, has no relationship to any of the special issues, but if you find such evidence is mitigating under these instructions, you shall consider the following instructions of the court. You and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the special issues, deserves.
>
> You are instructed that some mitigating evidence, if any, may not be relevant to resolving the special issues but may be relevant in determining whether or not the defendant should be put to death.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at

> least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

Tr 313-14.[14] The supplemental instruction clearly directed the jury to consider mitigating evidence and to give Robertson a life sentence if it found that evidence sufficiently lessened his moral culpability, regardless of the two statutory special issues. Robertson does not dispute this. Rather, his sole complaint is that the supplemental instruction could not constitute an adequate vehicle because it was an unconstitutional "nullification" instruction under *Sparf v. United States*, 156 U.S. 51 and *Roberts v. Louisiana*, 428 U.S. 325.

Initially, in a dissenting opinion, disagreeing with the plurality's finding that the petitioner's proffered evidence did not have mitigating value beyond the scope of the Texas special issues, three members of this Court specifically suggested the use of an instruction nearly identical to that provided in the instant case to cure an infirmity where proffered evidence did have mitigating value beyond the scope of the Texas special issues.

> Petitioner therefore was at least entitled to an instruction informing the jury that it could answer one of the issues "no" if it found by that evidence that petitioner's character was such that he should not be subjected to the ultimate penalty. The failure to give such an instruction removed that evidence from the sentencer's consideration just as effectively as would have an instruction informing the jury that petitioner's

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[14] This instruction did not include the less than artful phrase ("as reflected by a negative finding") which appeared in the instruction given in Penry's retrial ("*Penry II*"), and which is now under review by this Court. *See Penry v. Johnson*, 215 F.3d 504, 508 (5th Cir.), *cert. granted*, 121 S.Ct. 563 (2000).

character was irrelevant to its sentencing decision.

Franklin, 487 U.S. at 192-93 (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting).

In any event, this case is clearly distinguishable from *Roberts*. In *Roberts*, this Court declared unconstitutional Louisiana's mandatory death sentence statute because it failed to comply with the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. *Roberts*, 428 U.S. at 334. Under the Louisiana system, once a jury found a defendant guilty of first-degree murder, the defendant would be automatically sentenced to death; however, the jury in every first-degree murder case was instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there was not a scintilla of evidence to support the lesser verdicts. *Id.* At the same time, however, the jury was instructed "to return a guilty verdict for the offense charged if warranted by the evidence and to consider lesser verdicts only if the evidence does not justify a conviction on the greater offense." *Id.* at 334 n.10. This Court found that there was "an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Id.* at 335.

Unlike Roberts, the jurors in the instant case were neither instructed nor invited to disregard the law, the instructions, their oath, or the evidence; instead, the jury was instructed how to obey the law (as decided by this Court and set forth by the trial judge) by imposing a life sentence (by answering at least one of the Special Issues "No") if the jury found that such was appropriate.

Further, *Roberts* is entirely irrelevant in light of the material differences between the capital sentencing at issue in *Roberts* and the Texas scheme. While *Roberts* involved a mandatory capital sentencing statute, Robertson's trial was bifurcated into separate guilt-innocence and punishment phases.

> Elimination of the mandatory-sentencing procedure also eliminates the problem of the possibility of jury nullification which has been known to arise under mandatory schemes. If a jury does not believe that a defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense. . . . The guided-discretion statutes that we have upheld . . . . provide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other.

Sumner v. Shuman, 483 U.S. 66, 85 n.13 (1987) (citation omitted); *see also Graham v. Collins*, 506 U.S. 461, 486 (1993)(Thomas, J., concurring) (Mandatory death statutes like those in *Roberts* were invalidated for three reasons, one being that "experience had suggested that such statutes 'simply papered over the problem of unguided and unbridled jury discretion' by provoking arbitrary jury nullification") (citation omitted).

Because Robertson's trial was bifurcated, and because the jury was able to exercise guided discretion at the punishment phase, it was empowered to effectively assess a life sentence without resort to nullification of the law as defined by this Court's jurisprudence. Thus, the concerns of *Roberts* are not present. Alternatively, because the instruction given in this case did not encourage the jury to avoid the controlling law, but rather told the jury how to obey the law as explained by this Court in *Penry*, the concerns of *Sparf v. United States*, 156 U.S. 51, are likewise not present.

For all of the above reasons, the lower courts' rejection of Robertson's claim concerning the punishment phase jury instructions was entirely correct under the AEDPA standard of review. This case does not present facts "materially indistinguishable" from this Court's

precedent. And, even assuming *arguendo* that the underlying state court decision was erroneous, it certainly was not objectively unreasonable.

IV.

ROBERTSON HAS NOT SATISFIED THE STANDARD FOR OBTAINING A STAY OF EXECUTION.

Robertson is not entitled to relief on his application for stay of execution. In deciding whether to grant a stay, the Court is guided by the following standard:

> [T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983) (citations omitted). Because it is clear that the courts below correctly resolved the issues presented and that their resolution only involved the application of well-established precedent to the facts of this case, it is highly improbable that certiorari will be granted, much less that the decision below will be reversed. *See Miller v. Johnson*, 200 F. 3d 274 (5th Cir.), *cert. denied*, 121 S.Ct. 122 (2000); *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied* 525 U.S. 969 (1998). Robertson thus cannot satisfy the standard for obtaining a stay.

V.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Robertson's petition for writ of certiorari and motion to stay execution be denied.

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